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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

NATIONAL COALITION FOR MEN) Case No.: CV13-02391-DSF(MANx)
and JAMES LESMEISTER,)
Individually and on behalf of others) Hearing Date: July 29, 2013
similarly situated,) Hearing Time: 1:30 p.m.
PLAINTIFFS,) Hearing Location: Courtroom 840,
vs.) Roybal Federal Building, 255 East
SELECTIVE SERVICE SYSTEM;) Temple Street, Los Angeles California
LAWRENCE G. ROMO, as Director of) 90012
SELECTIVE SERVICE SYSTEM; and)
DOES 1 through 10, Inclusive,)
DEFENDANTS.)

**DEFENDANTS' REPLY MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opp'n") confirms that this case should not have been brought in this Court, by these Plaintiffs, at this time. While now apparently conceding that Counts I & II must be dismissed, (Opp'n at 17), Plaintiffs attempt to salvage Count III by pressing standing arguments rejected by the Supreme Court, misapplying the law of venue, and inviting the Court to decide military policy regarding Selective Service registration before allowing Congress the opportunity to even consider the changes that the military will be implementing for the next few years. Even were this case properly before the Court, the Supreme Court's decision in *Rostker v. Goldberg*, 453 U.S. 57 (1981)—which Plaintiffs concede remains binding on this Court—bars the relief that Plaintiffs seek. Pursuant to that authority, the Court should wait for Congress to react to the implementation of changes to military policy in accordance with the procedures established for this very purpose. See 10 U.S.C. § 652(a)(3)(B).

I. NEITHER LESMEISTER NOR NCFM HAS SHOWN STANDING.

Article III's standing requirement is rooted in the separation of powers. See *Allen v. Wright*, 468 U.S. 737, 752 (1984). Courts are expected to exercise the judicial power sparingly ““in the last resort and as a necessity.”” *Id.* (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). This approach to jurisdiction ““prevent[s] the judicial process from being used to usurp

1 the powers of the political branches.”” *Hollingsworth v. Perry*, ___ U.S. ___, 2013
 2 WL 3196927 at *6 (June 26, 2013) (quoting *Clapper v. Amnesty Int’l USA*, 133 S.
 3 Ct. 1138, 1146 (2013)). The standing inquiry is particularly rigorous where a
 4 plaintiff seeks a judicial determination that the acts of the political branches are
 5 unconstitutional, and the courts are particularly reluctant to find standing in cases
 6 challenging the necessity of military activities. *See Clapper*, 133 S. Ct. at 1147;
 7 *see also, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 11-16 (1972).

8 Plaintiffs’ Opposition makes no effort to grapple with the standing problems
 9 inherent on the face of their Complaint. Plaintiffs bear the burden of pleading
 10 sufficient factual information to conclude that this Court has jurisdiction. *See*
 11 *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010). Having failed to plead such
 12 factual information, Plaintiffs’ Complaint must be dismissed because neither James
 13 Lesmeister (a male who has already registered with the Selective Service) nor the
 14 National Coalition for Men (an organization that has not specified an individual
 15 member with standing to sue in his own right) has shown standing to invoke this
 16 Court’s jurisdiction.

17 **A. Lesmeister Lacks Standing to Pursue this Case.**

18 Plaintiffs make two equally unavailing arguments that Lesmeister has
 19 properly alleged standing despite already being registered with the Selective
 20 Service and failing to identify any personal harm in the Complaint. Plaintiffs first
 21 argue that because the plaintiffs in *Rostker* had already registered and were
 22

1 allowed to proceed, Lesmeister has standing to sue here. Specifically, Plaintiffs
 2 argue that, since the three judge panel in the case underlying *Rostker* concluded
 3 that the plaintiffs there had standing to pursue their claims, *see Goldberg v.*
 4 *Rostker*, 509 F. Supp. 586, 590-91 (E.D. Pa. 1980), there must have been
 5 jurisdiction. But Plaintiffs ignore the fact that the Supreme Court did not have
 6 occasion to consider the issue, because the United States did not argue for
 7 dismissal on standing grounds before that tribunal. *See Br. for Appellant, Rostker*
 8 *v. Goldberg*, No. 80-251, 1981 WL 390367 (Jan. 1981). When the Supreme Court
 9 passes on the merits of an issue without considering jurisdiction, its decision is not
 10 binding precedent on jurisdictional issues. *See Burbank-Glendale-Pasadena*
 11 *Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363 (9th Cir. 1998) (citing
 12 *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)).
 13 Accordingly, the holding of a three-judge panel in 1980, before the Supreme Court
 14 decided the cases on which Defendants rely, *see* Defs.' Mem. at 8-11¹, does not
 15 control the outcome of this case.
 16

17 Moreover, standing jurisprudence demonstrates that a plaintiff must allege
 18 and establish a concrete, personal harm in order for the court to exercise
 19 jurisdiction. And, while the three judge panel in *Rostker* concluded that the risk of
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 26 ¹ Citing, *inter alia*, *Clapper*, 133 S. Ct. 1138; *Steel Co. v. Citizens for a Better*

27 *Env't*, 523 U.S. 83, 106-07 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

28 577 (1992).

1 being drafted was a harm, that holding cannot be squared with *Clapper*'s
 2 instruction that standing not rely on speculative future events. *See* Defs' Mem. at
 3 9-10 (citing *Clapper*, 133 S. Ct. at 1142). Tellingly, Plaintiffs do not even attempt
 4 to show a person injury.

6 Instead, Plaintiffs argue that because "sex discrimination is injurious in and
 7 of itself" they have standing, claiming that the MSSA's male only registration
 8 requirement "sends a message that both sexes have a 'place' and that males are the
 9 disposable sex when it comes to defending the nation." Opp'n at 6-7. But the
 10 Supreme Court has rejected the view that, because discrimination is harmful in and
 11 of itself, standing is conferred on anyone who feels generally stigmatized by a
 12 classification. *See Allen*, 468 U.S. at 755 (1984).

15 In addition, as the Court observed in *Valley Forge Christian Coll. v.*
 16 *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86
 17 (1982), Plaintiffs must identify an injury "suffered by them *as a consequence* of
 18 the alleged constitutional error, other than the psychological consequence
 19 presumably produced by observation of conduct with one disagrees." Here,
 20 Lesmeister has not alleged any injury (stigmatic or otherwise) in the Complaint.
 21 He remains equally unlikely to be subject to a future draft (the shape of which
 22 cannot be known today) whether additional citizens are or are not required to
 23 register.

28 Thus, Lesmeister's position compares unfavorably to the plaintiff in *Orr v.*

1 *Orr*, 440 U.S. 268 (1979), the only federal case he cites in support of his standing
2 argument. The *Orr* Court did not endorse the inherent stigma argument that
3 Lesmeister now advances. Rather, *Orr*'s standing analysis focuses on the tangible
4 consequences of the challenged law. In that case, a man who, instead of paying
5 court ordered alimony to his ex-wife, challenged an Alabama statute providing
6 alimony for women, but not men. The Court observed that, even though Orr might
7 not be eligible for alimony anyway, he still had standing because if the statute were
8 struck down, Alabama might either "(1) permit awards to husbands as well as
9 wives, or (2) deny alimony to both parties." *Orr*, 440 U.S. at 272. Though the first
10 option would provide Orr no benefit, the Court reasoned, the second option would
11 assist him inasmuch as he might not have to pay alimony at all. Here, the request
12 for injunctive relief will have no effect on Lesmeister's status with the Selective
13 Service. Rather, the only injury that can be redressed would be Lesmeister's
14 personal dissatisfaction with the fact that he was required to register, but women
15 were not. This is not a concrete injury for standing purposes. Thus, contrary to his
16 contention, the fact that Lesmeister has already complied with the law is fatal to his
17 claim to standing.

23 Plaintiffs' remaining argument—that it makes little sense to require
24 Lesmeister to break the law to challenge it—is also meritless. Lesmeister was
25 free to challenge the law prior to his registration. He was free to decline to register
26 and challenge the statute at that point. *See, e.g., Jacobrown v. United States*, 764
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28

1 F. Supp. 221, 223 (D.D.C. 2011). Indeed, Plaintiffs do not indicate whether
 2 Lesmeister registered before or after the changes in military policy at issue in this
 3 case, so the Court cannot conclude that he suffered from the discrimination alleged
 4 in the Complaint. Absent a demonstration of standing, the Court must dismiss
 5 Lesmeister from the case.

6

7 **B. Plaintiff National Coalition for Men Also Fails to Meet *Earth*
 *Island Institute's Requirements for Organizational Standing.***

8

9 Plaintiff NCFM’s attempt to resurrect its right to proceed as an
 10 organizational plaintiff is even more unfounded. Plaintiffs assert that the fact that
 11 they have alleged that “NCFM members include males ages 18-25 who ‘would
 12 otherwise have standing to sue in their own right,’” is sufficient to establish
 13 standing, without addressing any of the precedents cited by Defendants. *See*
 14 Opp’n at 8-9. The Supreme Court’s holding in *Earth Island Institute*, faithfully
 15 applied by courts in this Circuit, could not be any clearer: Plaintiffs must “make
 16 specific allegations establishing that at least *one identified member* had suffered or
 17 would suffer harm.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-98 (2009)
 18 (emphasis added). Plaintiffs have failed to identify any member of NCFM who
 19 has been harmed by the MSSA and thus have failed to comply with the instructions
 20 in *Earth Island Institute* by failing to name a single member who has standing to
 21 sue in his own right. Accordingly, the NCFM must also be dismissed.

22

23 **II. VENUE IS IMPROPER IN THIS DISTRICT.**

24 Should the Court conclude that it has jurisdiction over either of the
 25 Reply Mem. in Supp. of Mot. to Dismiss, *National Coalition for Men, et al. v. Selective Service System, et al.*,
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1 Plaintiffs' claims, venue is improper in the Central District of California. *See* 28
2 U.S.C. § 1391(e)(1). As Plaintiffs concede, NCFM is headquartered not in Los
3 Angeles, but in San Diego. *See* Defs.' Mem. at 14-16. An organization is deemed
4 to reside where its headquarters are located, *see* Defs.' Mem. at 14, so NCFM
5 resides not in the Central District of California, but in the *Southern* District of
6 California. Plaintiff Lesmeister resides near Houston, Texas, and the Federal
7 Defendants reside in Washington, D.C. Thus, according to the residency
8 provisions of the federal venue statute, venue could be proper in (a) the District of
9 the District of Columbia, (b) the Southern District of Texas, or (c) the Southern
10 District of California. *See* 28 U.S.C. § 1391(e)(1)(A) & (C). None of the Plaintiffs
11 reside in the Central District of California, so venue cannot be proper there under
12 the residency tests in 18 U.S.C. § 1391(e).² Were there any doubt, Plaintiffs' own
13 citation to the three judge panel decision in *Rostker* proves the Defendants' point.
14 *See* Opp'n at 10. In that case, the court carefully noted that one of the Plaintiffs
15 resided in the Eastern District of Pennsylvania, where the action was heard. *See*

22 ² Plaintiffs cite the decision of a Magistrate Judge in the Northern District of
23 California, *Center for Biological Diversity v. National Science Found.*, No. C 02-
24 5065 JL, 2002 WL 31548073 (N.D. Cal. Oct. 30, 2002). That court found venue
25 on the apparent conclusion that plaintiff was deemed to reside in the Northern
26 District of California because it maintained an office there. Not only does this
27 decision predate the Supreme Court's holding that the principle place of business
28 for an organization is generally where its headquarters are located, *see Hertz Corp.*
v. Friend, 130 S. Ct. 1181, 1192 (2010), but Plaintiffs do not even assert that
NCFM maintains an *office* in the Central District of California, let alone its
headquarters.

1 Goldberg, 509 F. Supp. at 588 n.2. Defendants' contention is not that the case
2 must be heard in Washington, D.C. Rather, it is that by law, it must be heard
3 where at least one Plaintiff resides.
4

5 Nor is Plaintiffs' argument that venue is proper in the *Central* District of
6 California because men in California in general are subject to draft requirements
7 remotely on point. Plaintiffs argue (without citation) that more men in California
8 register for the draft than in Washington, D.C., *see Opp'n* at 10, but the argument
9 is a non sequitur. The question presented by the venue statute is different than a
10 *forum non conveniens* argument in which the Court analyzes which venue is the
11 most sensible. *See, e.g., Viscofan USA, Inc. v. Flint Group*, No. 08-CV-2066, 2009
12 WL 1285529, at *6 (C.D. Ill. May 7, 2009) ("The doctrine of *forum non*
13 *conveniens* is based on the inconvenience of the chosen venue, not the impropriety
14 of venue under federal venue statutes."). The question under 28 U.S.C.
15 § 1391(e)(1) is where the events giving rise to the claim occurred. Plaintiffs have
16 failed to allege a single event occurring in this judicial district. The United States'
17 policy decisions were made in the nation's capital. Lesmeister was required to
18 register in Texas. NCFM has identified no member in Los Angeles who was
19 required to register after the United States changed its military policies. Venue in
20 the Central District of California is improper in this case.
21

22 Finding no support in the law itself, Plaintiffs resort to an extra-statutory
23 argument that the Court should find venue here because Plaintiffs would prefer to
24

1 litigate where their pro bono attorney is located. Even if that argument compelling
2 (and it is not), venue in the United States Federal Courts is set by statute and
3 cannot be amended by considerations of the Plaintiffs' convenience. *See Leroy v.*
4 *Great W. United Corp.*, 443 US. 173, 183-84 (1979). Because Plaintiffs have not
5 made even a colorable showing as to why this matter may be heard in the Central
6 District of California, the Court should dismiss for lack of venue. *See* 28 U.S.C. §
7 1406(a).

10 **III. PLAINTIFFS' CLAIM IS NOT RIPE.**

11 Apart from the obvious standing and venue problems, Plaintiffs have
12 brought this case while the military is in the process of implementing changes to
13 the United States' armed forces and before Congress has had an opportunity to
14 consider changes to the MSSA in response to modified military policies. Plaintiffs
15 proceed from an assumption that it is appropriate for courts to declare statutes
16 unconstitutional when factual circumstances change before allowing other
17 branches of government to act. This view is inconsistent with both the
18 constitutional and prudential doctrines of ripeness.

22 Defendants agree with Plaintiffs that prudential ripeness requires the court to
23 consider the fitness of an issue for decision as well as the hardship visited upon
24 parties while a decision is withheld. *See* Opp'n at 13 (citing *Abbot Labs. v.*
25 *Gardner*, 387 U.S. 136, 149 (1977)). Here, the issue is not yet fit for judicial
26 decision because the full implementation of the changes to the structure of the
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United States armed forces has not been revealed and Congress has not yet had the opportunity to consider how the MSSA should be changed in light of those implementation plans. The *Rostker* Court emphasized that matters of military decision-making must be left in large measure to Congress. *See Rostker*, 453 U.S. at 64-68. Plaintiffs propose that, without waiting for Congress to consider changes to the MSSA, it should decide a significant question of constitutional law. Not only would such an act be imprudent, but it would not be necessary to avoid any genuine hardship. Plaintiff Lesmeister has already registered with the Selective Service and thus faces no injury that would be redressed. Moreover, Defendants do not contend that the courts would have to stay their hand indefinitely, as Plaintiffs assert. Rather, as explained in their opening Memorandum, implementation of changes to the United States military (which will include establishing criteria for both men and women to be included in combat units) are scheduled to be addressed in less than three years. *See* Defs.' Mem. at 6. Prudence requires that the Courts give the Executive and Legislative branches the opportunity to adjust their policies before attempting to undertake judicial review in this important area of policy and law.

IV. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Should the Court decide to address the merits, it should dismiss the case for failure to state a claim upon which relief can be granted. Plaintiffs do not respond to Defendants' arguments that Counts I and II, which assert claims that generally Reply Mem. in Supp. of Mot. to Dismiss, *National Coalition for Men, et al. v. Selective Service System, et al.*, CV13-02391-DSF(MANx)

1 can only be brought against state officials, must be dismissed. *See* Defs.' Mem. at
 2 18; Opp'n at 17. Having offered no opposition to Defendants' motion on this
 3 score, the Court should dismiss these counts.
 4

5 Plaintiffs do attempt to contest Defendants' arguments that Plaintiffs fail to
 6 state claim under the Fourteenth Amendment's guarantee of equal protection under
 7 the laws. Plaintiffs' response however, is an unavailing admixture of incorrect
 8 legal arguments that fail to grapple with Defendants' central points.

9 *First*, Plaintiffs simply ignore Defendants' argument, *see* Defs.' Mem. at 23-
 10 25, that the Court is bound, as a matter of *stare decisis*, to follow the Supreme
 11 Court's decision in *Rostker* unless and until the Supreme Court itself overturns the
 12 decision. This is the settled law of the Supreme Court and the Ninth Circuit. *See*
 13 *id.* Accordingly, even if the Court has doubts as to *Rostker*'s continuing vitality, it
 14 must still dismiss the complaint.

15 *Second*, even if the Court were to conclude that changes in factual
 16 circumstances allow it to revisit *Rostker*, that would not alter the Court's obligation
 17 to defer to Congress's military judgments in the first instance—an obligation
 18 reiterated time and again since the *Rostker* decision. *See* Defs.' Mem. at 20 n.3
 19 (collecting cases). Here, as Plaintiffs do not deny, Congress has created a
 20 mechanism for reassessing the necessity of female registration as the military
 21 implements changes to its personnel policies. *See* Defs. Mem. at 22-23. And it is
 22 clear that courts should avoid deciding constitutional questions in favor of allowing
 23

the political branches to consider a problem in the first instance (even where they may harbor doubts on constitutional issues). *Compare, e.g., Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 205-06 (2009) (avoiding constitutional question while expressing concerns about constitutionality of statute) *with Shelby Cnty., Ala. v. Holder*, ___ U.S. ___, 2013 WL 3184629 at *18 (June 25, 2013) (noting that by avoiding the constitutional question in *Northwest Austin*, the Court afforded Congress time to act in light of the Court's concerns). The Constitution assigns to Congress the power make decisions concerning the raising of armies. The Court should defer to Congress's authority (as required by *Rostker*) by allowing Congress to consider changes to the male-only registration requirement first.

CONCLUSION

For the forgoing reasons, this case must be dismissed.

18 Dated: July 15, 2013 Respectfully Submitted,

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